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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 506

J. A. BOOKER ET AL.,
Petitioner,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, INC., ET AL.,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No.

J. A. BOOKER ET AL.,
Petitioner,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, INC., ET AL.,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

The petition of J. A. Booker *et al.*, for writ of certiorari respectfully shows:

1. That petitioners are seeking a writ of certiorari directed to the Supreme Court of Georgia to review the final action of said court in affirming the judgment of the Superior Court of Chatham County, Georgia, by a decision rendered on the 11th day of September, 1959.

2. Petitioners, namely, J. A. Booker, Bernard B. Eichholz, O. E. Bright, Harry T. Shore, Jr., Mrs. Louise

B. Shore, C. J. Branch, Thomas J. Dooley, Jr., Carl Preslar, Stanley Harris, John Noglik and Margaret Noglik, filed the original proceedings in the Superior Court of Chatham County, Georgia, against the defendants in Certiorari, First Federal Savings and Loan Association and A. Pratt Adams, Jr., Dale Critz, Kenneth C. Lasseter, Hugh Hill and George E. Oliver, directors, in which they alleged that they were depositors and members of said institution which was incorporated by charter granted under the terms of Federal Home Loan Bank Act, as amended, issued in 1935 under the provision of the Federal Home Loan Bank Act, as amended, Public Law 304, 72nd Congress, approved July 22, 1932, 47 Stat. 725, 12 U.S.C. 1429, *et seq.*, being known as "Act to Create Federal Home Loan Banks, to Provide for the Supervision Thereof and for Other Purposes". Said charter being granted to said association as provided for in Section 5 of said Home Owners Loan Act of 1933, as amended, and has operated as such a savings and loan institution under the laws of the United States and by virtue of said Federal Charter since said time, having been granted a charter, under the rules and regulations governing Federal Savings and Loan Systems, known as Charter "K" revised.

3. That under the Act creating the Federal Home Loan Bank System, this system is composed of eleven regional Federal Home Loan Banks, located in New York, Boston, Pittsburgh, Greensboro, North Carolina, Cincinnati, Indianapolis, Chicago, Des Moines, Little Rock, Arkansas, Topeka and San Francisco. The local Institution in Savannah, Chatham County, Georgia, is under the supervision and jurisdiction of the Federal Home Loan Bank of Greensboro, North Carolina, located in Greensboro, N. C.

4. Upon being granted a charter with the right to do business as such in 1935, said institution commenced business, as aforesaid, in said city, state and county, and has been governed by officers and a Board of Directors and is still so governed.

5. That under the charter and rules and regulations of the Federal Home Loan Bank, the annual meeting of the members of the Association for the election of directors and for the transaction of any other business of the Association shall be held in its Home Office at 2 o'clock P.M. in the afternoon, on the third Wednesday in January of each year, if not a legal holiday, or if a legal holiday, on the next succeeding day not a legal holiday, and following the meeting of the Board of Directors, said Board shall elect a president, one or more vice-presidents, a secretary and a treasurer.

6. Said institution does not have outstanding stock but is governed by its members' membership being based on the amount of deposits that such person or persons shall have in said institution, with such number of votes as shall be deposited in said institution at the time fixed by its rules and regulations, and also, all borrowers from said institution shall likewise be members and have a right to participate in the election of the Board of Directors annually. Each holder of a savings account being permitted to cast his vote for each $100 or fraction thereof of the withdrawal value of his account, and the borrowing member shall be permitted to cast one vote and such number of votes to which he may be entitled as a holder of a savings account, but no member, however, shall cast more than fifty votes. The number of votes which each member shall be entitled to cast at any meeting of its members shall be determined upon the books of the Association as of the end of the calendar month next preceding the date

of such meeting, and the Association shall be under the direction of a Board of Directors of not less than five nor more than fifteen, as fixed in the Association's by-laws. That during the year 1958, the officers of the institution were as follows:

O. E. Bright, Chairman of the Board
J. D. McLamb, President
L. H. Smith, Vice-President
A. J. Bright, Jr., Secretary
B. A. Gill, Treasurer
Roy E. McCabe, Asst. Secretary

The directors of the institution were as follows:

O. E. Bright, Chairman of the Board
J. D. McLamb
A. J. Bright, Jr.
J. A. Booker
Charles E. Bell
L. H. Smith
Dale Critz
Lewis M. Little

That shortly before the Annual meeting of said Board of Directors which was held in the offices of said institution at 30 East Bryan Street, Savannah, Chatham County, Georgia, on the 21st day of January, 1959, commencing at 2 P.M., O. E. Bright, Chairman of the Board and one of the directors had previously resigned and A. Pratt Adams, Jr., had been elected as a director to replace him and a short time later Ken Lasseter was elected an additional director.

7. Under the provisions of the Board, the directors were elected for staggered terms. The terms of Dale Critz, Joe Booker and A. J. Bright, Jr., expired at the end of the year 1958. Dale Critz was renominated for re-election at the annual meeting held, as aforesaid, and Joe Booker and

A. J. Bright, Jr. were not. A. Pratt Adams, Jr., and Ken Lasseter were also renominated by management to be elected at said annual stockholder's meeting and Hugh Hill was nominated as a new director and Judge George E. Oliver was also nominated as a new director to succeed Ken Lasseter when his term expired at the end of 1960.

8. That following said annual meeting, the alleged Board of Directors elected the following officers:

J. D. McLamb, President
L. H. Smith, Vice-President
B. A. Gill, Vice-President and Controller
W. Norton Street, Vice-President and Loan Officer, and
Lewis M. Little, Secretary

9. Petitioners show that the said defendant corporation had 13,234 members composed of depositors and borrowers as of December 31, 1958, and that in their annual report as of December 31, 1958, their total assets were $22,207,087.32 with reserves of $1,158,214.87.

10. Petitioners show that under the charter and rules and regulations as aforesaid pertaining to said institution, members are permitted to vote at all meetings either in person or by proxy, but there are no rules and provisions as to the type of proxies that could be used or the form, and that, therefore, the same is governed by the laws of Georgia pertaining to corporations.

11. That whenever any person desires to become a member of the First Federal Savings and Loan Association and to open an account therein, he or she are required to sign what purports to be a signature card but what actually contains in fine print in addition thereto a proxy to the official proxy committee of the institution, and that as far as petitioners know or have been advised, none of

the members required to sign said so-called signature cards were apprised or acquainted with the fact that they were giving a proxy authorization to the management of said institution to an alleged proxy committee for an indefinite period of time.

12. Petitioners show that said alleged proxies are invalid for the further reason that:

(a) They are not addressed to two or more persons to act as agents for said proxies as required by Code Section 22-1863 of the Code of Georgia.

(b) The proxies are not limited as to time and are uncertain and indefinite.

(c) Failed to set out the powers conferred by such written instrument as required by law, or the meeting or meetings and the times at which said meetings are to be held.

(d) That there being no persons named in said proxies, an authorization to a proxy committee in which no persons have been designated is in legal significance an authorization in blank and is contrary to law and public policy.

(e) Because said proxies are vague, uncertain and indefinite in that no limitations are placed upon the so-called proxy committee and such vague, indefinite authorization and conferring of power is contrary to the statutes and to the public policy of the State.

(f) Because of the facts set forth in paragraph 13, there was no meeting of the minds, or intention on part of the parties to enter into a contract, to-wit: proxy authorization.

(g) Because the proxies being based on the amount of deposits and or borrowing are for an indefinite number of votes which may vary depending on the time same are used, and therefore are uncertain, indefinite, ambiguous and invalid.

13. Petitioners show that at the time of the scheduled annual meeting which was called at the Home Office starting at 1 P.M. on the third Wednesday, January 21, 1959, as provided for in the rules and regulations of the Federal Home Loan Bank, which governs the operations of said local institution, printed ballots were given to the various members who were present with the names of the directors to be elected, who had been nominated by the nominating committee named by management. There was no provision provided for any other person or persons to be voted on. That although the directors, under the rules and by-laws had a right to call the meeting at some other place or to adjourn it to some other place, the president failed to do so and held the meeting in a small room approximately 8 x 15 with a large table in the middle thereof and chairs for about 8 persons. At that time there were approximately 75 to 100 members present and the room was capable of holding only 12 to 15 persons with the result that members were crowded into other rooms and into the corridor out of hearing of the meeting, with the result that the meeting was not conversant to more than 15 or 20 persons. The meeting continued on for several hours in order that the proxies might be tabulated downstairs in the banking quarters of the institution and as a result thereof, many of the members left and when the results were announced, it was announced by the auditor, Walter C. Askew, and the alleged proxies were never brought into the meeting, only the alleged results from the tabulations of the proxies

downstairs and the only votes which actually were voted on at the meeting were those by members who were crowded around the small table to sign their names. The number of votes having already been written on said ballots and the voting was not secret as every member had to identify himself with the result that by the use of the proxies in the form indicated, which was legally objectionable, the president announced that the nominees of management had been elected by a very large majority when in truth and in fact, if the meeting were held properly and if the proxies which were illegally voted were legal proxies, a majority of the legal votes cast were against the election of the nominees of the nominating committee, to-wit: Dale Critz, A. Pratt Adams, Ken Lasseter, Hugh Hill and George E. Oliver.

14. Petitioners show that under the rules and regulations of said organizations, not only must the names of nominees be posted ten days before the election, which petitioners admit was done, but the proxies must be turned over to the Secretary for the use of the proxy committee, which was not done and the proxies, if valid, must be voted by the official proxy committee, which was also not done, and therefore because of the fact that the proxies were invalid and because said proxies were not deposited with the Secretary, as provided by law, and were not voted by the proxy committee as provided by law, all of the proxies voted by management in favor of the slate and which constituted a majority in favor of the slate of nominees, should not have been counted and if said proxies had not been counted, a majority of the votes cast would have been against the election of said nominees.

15. That under the law and the rules and regulations of said organization, where there are no nominees named

or elected, nominations could then have been submitted by the members and this would have resulted in the election of persons other than those nominated by management and declared to have been elected at said meeting, and the action of the president of said institution and the directors present in acquiescing in the action of the President and permitting the election to be held, as aforesaid, resulted in the illegal election of the directors chosen at said annual membership meeting.

16. That the rules and regulations of said institution denying to members the right to vote for persons of their choice at annual members' meetings are contrary to law and to public policy, and a taking of property without just compensation, and taking of property without due process of law in violation of Amendment XIV, U. S. Constitution Art. I, Sec. 805 of the Annotated Code of Georgia and Art. 1; Section 2-101, 2-102, 2-103 and Section 2-125.

17. That although said defendant corporation operates under a Federal charter, under its financial structure, jurisdiction under the Act of June 25, 1948, 28 U.S.C.A. 1349, does not lie in the United States District Court but in the State Courts of Georgia, and governed by the laws of Georgia.

18. This case involves the validity of the rules and regulations of the respondents, as set out in said petition, in which the allegation is made that said rules and regulations are illegal and contrary to public policy and contrary to Amendment XIV of the Constitution of the United States in that the right to vote for directors is forbidden and denied and said institutions created by Acts of Congress are self-perpetuating and said rules and regulations are contrary to the Acts of Congress and contrary to law.

19. The allegations in said petition aver that the proxies given to management are used to perpetuate said officers in office and that under their rules and regulations no person other than those nominated can be voted on by the stockholders at the stockholders meeting. That said rules and regulations and provisions, under which said association is governed, are unconstitutional and contrary to Article XIV of the Constitution of the United States.

20. Petitioners aver that a petition for declaratory judgment and a restraining order and temporary and permanent injunction was filed in Chatham Superior Court on the 19th day of February, 1959, to which petition a motion to dismiss was filed by the respondents and sustained by said Court on the 24th day of April, 1959. That from said adverse ruling a bill of exceptions was filed to the Supreme Court of Georgia, which court affirmed the judgment of the Superior Court of Chatham County, Georgia, on the 11th day of September, 1959.

21. Petitioners show that the issues as set forth above are as to whether or not (a) the rules and regulations of the defendant corporation are in keeping with the Acts of Congress under which it was established. (b) whether the rules and regulations themselves are valid and legal and are in violation of Article 14 of the Constitution of the United States.

22. Petitioners aver that this Court has jurisdiction. That the Federal Constitutional issues have been properly preserved and presented for consideration. The issues involved are as to the validity of the rules and regulations of said banking institution under the terms of the Fourteenth Amendment, which was determined by the Supreme Court of Georgia, and the opinion is incorporated into the record, and although petitioners do not agree with

the statement of their contentions by the Supreme Court of Georgia, such statement shows that a federal issue was presented and decided.

23. Petitioners show that a decision by the Supreme Court of Georgia is the final decision by the highest court of the State in which a decision could be had and that all remedies in the State Court have been exhausted.

24. Petitioners further show that the issues presented are substantial and that they are of national importance.

25. As far as petitioners are informed, this case presents for the first time the question as to whether or not the State Court in the determination of this issue has ruled correctly. The petitioners point out to the court that a determination of this question will determine the validity of the rules and regulations in thousands of other Federal Savings and Loan Associations of the Country who proceed under similar rules.

26. Petitioners set forth as an appendix to this petition which has been printed, they are filing with the Clerk of the Supreme Court of the United States the record set out in the petition and demurrers, judgment of the Superior Court of Chatham County, Georgia, the opinion and judgment of the Supreme Court of Georgia, all of which parts of the record have been certified to by the Clerk of the Superior Court in which said Court said original records are. A brief in support is being presented.

WHEREFORE PETITIONERS PRAY THAT a writ of certiorari issue under the seal of this court, directed to the Supreme Court of Georgia commanding said court to certify and send to this court a full and complete

transcript of the record and of the proceedings of the said Supreme Court of Georgia had in the case numbered and entitled on its docket, No. 20528. *J. A Booker et al., appellants, v. First Federal Savings & Loan Association et al., appellees*, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Supreme Court of Georgia be reversed by the court, and for such further relief as to this court may seem proper.

AARON KRAVITCH,
PHYLLIS KRAVITCH,
Attorneys for Petitioners.

CERTIFICATE OF COUNSEL.

I, AARON KRAVITCH, being of counsel for petitioners, do hereby certify that I have this day caused a copy of the petition, notice of the filing of the petition, copy of certified record and supporting brief to be served on counsel for the respondents within ten days after the filing. Opposing counsel being A. Pratt Adams, of the firm of Adams, Adams, Johnson & Brennan, and E. Ormonde Hunter of the firm of Connerat, Dunn, Hunter, Cubbedge & Houlihan.

This 1 day of Dec, 1959.

Of Counsel for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

J. A. BOOKER ET AL., *Plaintiffs in Certiorari,*

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, INC., ET AL., *Defendants in Certiorari.*

Notice.

To: A. Pratt Adams of the firm of Adams, Adams, Johnson & Brennan and E. Ormonde Hunter, of the firm of Connerat, Dunn, Hunter, Cubbedge, & Houlihan, Attorneys of record for the defendants in Certiorari.

In compliance with Rule 38 of the Supreme Court of the United States, please take notice that we are filing in the Supreme Court of the United States a petition for Writ of Certiorari, together with a certified transcript of the record and supporting brief as required.

This day of , 1959.

Of Counsel for Plaintiffs in Certiorari.

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IN THE

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OCTOBER TERM, 1959.

No. 506.

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Petitioners,

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Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI.

AARON KRAVITCH,
PHYLLIS KRAVITCH,
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Savannah, Georgia.

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IN THE

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OCTOBER TERM, 1959.

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Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI.

IN THE SUPREME COURT OF GEORGIA.

20528 A-12

BOOKER et al. v. FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION et al.

Decided September 11, 1959.

By the Court: A petition seeking injunctive relief and for a declaratory judgment, was subject to general de-

murrers interposed by the defendants and was properly dismissed.

ALMAND, Justice. The judgment under review is one sustaining the general demurrers to a petition seeking a declaratory judgment and a temporary and permanent injunction.

The petitioners are J. A. Booker and ten other persons. The defendants are the First Federal Savings and Loan Association of Savannah, a savings and loan institution, chartered and incorporated under the Federal Home Loan Bank Act (12 U.S.C.A. 1429 *et seq.*) and A. Pratt Adams and four other individuals, who are alleged to have been illegally nominated and elected directors of the association on January 21, 1959. For specified reasons, which will be set out in this opinion, it is asserted that these named defendants were nominated and elected illegally and in violation of the rights of petitioners, members of the association. The prayers of petitioners were for a declaratory judgment on certain specified claims and for an injunction restraining the named individuals from participating in the management of the association.

The grounds of the general demurrer were: (a) the petition shows no right to a declaratory judgment; (b) the petition fails to allege that the officers and directors would not have been elected even though the votes of the proxy committee had not been counted; (c) the petition fails to show that any attempt was made to nominate any other officers or directors; (d) the petition fails to allege a challenge to any of the votes which were cast in favor of the slate elected in person or by proxy, except those cast by the proxy committee; and (e) the petition shows that no other persons were nominated, hence any votes cast for the nominees were sufficient to elect them.

It was alleged that under the rules and regulations of the Federal Home Loan Bank Act (12 U.S.C.A. 1429) the annual meeting of the defendant association was held on January 21, 1959. At such meeting members of the association are permitted to vote in person or by proxy. Upon becoming members of the association the petitioners signed a membership card agreeing that: "The official proxy committee of the institution is authorized in my absence to cast my vote or votes at any meeting of the members from year to year until this proxy is cancelled in writing."

At the annual meeting for 1959 held pursuant to the rules and regulations of the association, printed ballots containing the names of the directors who had been nominated were given to the members present at the meeting —some 75 to 100 members being present. The votes of the members present and those voting by proxy were counted and it was announced those nominated had been elected by a large majority. It is alleged that if the proxies which were illegally voted were legal proxies, a majority of the legal votes cast were against the election of the nominees of the nominating committee.

The rules and regulations of the association, as shown by an exhibit to the petition, provided: "Section 144.6 (a) Nominating Committee. The president, at least 30 days prior to the date of each annual meeting, shall appoint a nominating committee of three persons who are members of the association. Such committee shall make nominations for directors in writing, and deliver to the secretary such written nominations at least 15 days prior to the date of the annual meeting, which nominations shall forthwith be posted in a prominent place in the home office for the 15 days' period prior to the date of the annual meeting. Provided such committee is appointed

and makes such nominations, no nominations for directors except those made by the nomination committee shall be voted upon at the annual meeting unless other nominations by members are made in writing and delivered to the secretary of the association at least 10 days prior to the date of the annual meeting, which nominations shall forthwith be posted in a prominent place in the home office for the 10 days' period prior to the date of the annual meeting. Ballots bearing the names of all persons nominated by the nominating committee and by other members prior to the annual meeting shall be provided for use by the members at the annual meeting. If at any time the president shall fail to appoint such nominating committee, or the nominating committee shall fail or refuse to act at least 15 days prior to the annual meeting, nominations for directors may be made at the annual meeting by any member and shall be voted upon.

(c) Voting by proxy. Voting at any annual or special meeting of the members may be made by proxy, it being provided that no proxies shall be voted at any meeting unless such proxies shall have been placed on file with the secretary of the association, for verification, at least five (5) days prior to the date on which such meeting shall convene."

It is asserted that these rules and regulations deny to the members the right to vote for persons of their choice and are contrary to law and to public policy and amount to a taking of property without just compensation and a taking of property without due process of law in violation of the Fifth Amendment to the Federal Constitution and Art. 1, Sec. 1, Pars. 1, 2, 3, 25 of the State Constitution.

It is a general rule that a corporation may enact any bylaw for its internal management so long as such bylaws

are not contrary to its charter, a controlling statute, its articles of incorporation or violative of any general law or public policy. Subject to the above qualifications a corporation may adopt bylaws regulating the calling and conduct of corporate meetings and elections of its officers. *Hornady* v. *Goodman*, 167 Ga. 555, 572 (146 S.E. 173).

Our attention has not been called to any statute of this State or any provision of the charter of the defendant association which forbids the adoption of the rules as to nomination and election of officers of the association set out above. On the contrary the bylaw under attack has been approved by the Central Board of the Federal Home Loan Bank (Vol. 23, No. 249, Fed. Reg. p. 9897).

The rule under attack expressly gives to each member the right to make nominations in writing to the secretary of the association at least 10 days prior to the annual meeting. At the annual meeting the names of those nominated by the members are required to be on the ballots.

The contention that these rules are invalid as depriving the members of their right to participate in the nomination and election of the directors of the association cannot be sustained.

We deem it unnecessary to consider the several attacks made on the validity of the proxy votes cast in the election of the directors by the proxy committee. It does not appear that any nominations for directors were before the meeting other than those submitted by the nominating committee. It appears that some 75 to 100 members of the association were present. The number of members voting by proxy other than by the proxy committee is not alleged. The plaintiffs had the right to make nominations 10 days before the annual meeting, but did not do so. Even if it be conceded that all of the votes cast by the proxy com-

mittee were void, it does not appear from the petition that the number of votes cast by other members in person or by proxy were insufficient to elect. It was alleged that at the meeting and after the ballots had been counted the president announced that the nominees of management had been elected by a large majority. This declared result of the election is *prima facie* the correct result. The burden is upon the plaintiffs to rebut this *prima facie* case by alleging facts showing that the requisite number of members had not voted for the election of the nominated directors. *Cowart* v. *City of Waycross*, 159 Ga. 589 (2) 594 (126 S.E. 476). See: *Leininger* v. *North American Nat. Life Ins. Co.*, 115 Neb. 801 (215 N.W. 167); *Stephens Fuel Co.* v. *Bay Parkway Nat. Bank of Brooklyn in New York*, 109 F.2d 186; *People* v. *Crossley*, 62 Ill. 195. "An election or other action at a corporate meeting is not rendered invalid because of the receipt of illegal votes, or the rejection of legal votes, if the result would have been the same had they been rejected or received, as the case may be." Fletcher, Cyclopedia Corporations, Vol. 5, Sec. 2044.

The allegations in paragraphs 15 and 16 of the petition that: "if the meeting were held properly and if the proxies which were illegally voted were legal proxies, a majority of the legal votes cast were against the election of the nominees of the nominating committee" and "all of the proxies voted by management in favor of the slate and which constituted a majority in favor of the slate of nominees, should not have been counted and if said proxies had not been counted, a majority of the votes cast would have been against the election of said nominees" are too loose and general to bring into question the legality of the votes cast by the proxy committee. *Collins* v. *Huff*, 63 Ga. 207 (2); *Schmidt* v. *Mitchell*, 117 Ga. 6 (43 S.E. 368); *Norwood* v. *Peoples*, 158 Ga. 162 (4) (122 S.E. 137).

The petition failing to state a cause of action for a declaratory judgment and injunction, it was not error to sustain the general demurrers and dismiss the petition.

Judgment affirmed. All the Justices concur.

ATLANTA
September 11, 1959

The Honorable Supreme Court made pursuant to adjournment:

The following judgment was rendered:

J. A. Booker et al.,

vs.

First Federal Savings and Loan Association, Inc., et al.

This case came before this court upon a writ of error from the Superior Court of Chatham County: And, after argument had, it is considered and adjudged that the judgment of the Court below be affirmed. All the Justices concur.

Bill of costs $15.00

SUPREME COURT OF THE STATE OF GEORGIA.

Clerk's Office, Atlanta
September 22, 1959

That the above is a true extract from the minutes of the Supreme Court of Georgia and that Aaron Kravitch paid the above bill of costs.

Witness the signature and the seal of the said court hereto affixed the day and year above written.

K. C. BLECKLEY,
Clerk, Supreme Court of the
State of Georgia.

J. A. BOOKER ET AL.,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION ET AL.

ORDER.

The within case having been carried to the Supreme Court of Georgia upon a writ of error and after hearing thereon, the judgment of the Superior Court of Chatham County, Georgia, having been affirmed,

It is thereupon considered, ordered and adjudged, that the judgment of the Supreme Court of Georgia be and is hereby made the judgment of the Superior Court of Chatham County, Georgia.

And it is so ordered.

This 21st day of October, 1959.

s/ Dunbar Harrison,
Judge, E. J. C. of Georgia.

CERTIFICATE OF CLERK.

I, WILLIAM B. SCOTT, Clerk of the Superior Court of Chatham County, Georgia, do hereby certify that the within opinion of the Supreme Court of Georgia, the remittitur of the Supreme Court of Georgia, and judgment of the Superior Court of Chatham County are true and correct and are on file in this office.

This 5 day of Nov, 1959.

s/ William B. Scott
Clerk, Superior Court of Georgia.

CERTIFICATE OF COUNSEL.

I, AARON KRAVITCH, do hereby certify that I have delivered to counsel for the respondent copy of said appendix.

This day of , 1959.

AARON KRAVITCH,
Of Counsel for Petitioners.

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No. 506

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Petitioners

vs.

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, ET AL.
Respondents

ANSWER AND BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

E. ORMONDE HUNTER
Attorney for Respondents

Of Counsel

ADAMS, ADAMS, JOHNSON & BRENNAN,
CONNERAT, DUNN, HUNTER, CUBBEDGE
& HOULIHAN,
Attorneys at Law,
P. O. Box 525, Savannah, Georgia

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October Term 1959

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VS.

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, ET AL.
Respondents

ANSWER AND BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

Generally

By-Law Governing Nominations

It is felt that the controlling point in the case can be quickly and briefly pointed out, which should immediately dispose of the Petition.

The Petition in the Superior Court and the Bill of Exceptions to the Supreme Court of Georgia alleged that a by-law providing for the manner of making nominations was unconstitutional in that it violated the 5th Amendment. Now, after the case has left the State Supreme Court the petition for certiorari does not even mention the 5th Amendment. Surely the Supreme Court of the United States will not consider

an objection under the 14th Amendment that was not considered in either of the Courts below. *Corkran Oil Co. v. Arnaudet*, 199 U.S. 182 at 193.

We think we have already disposed of the only ground on which this Honorable Court would even consider a writ of certiorari, but to clinch the point the Petitioners now are relying on the 14th Amendment for their constitutional objections and the prohibitions of the 14th Amendment have reference to State action exclusively. The by-law of the First Federal Savings and Loan Association that is being attacked admittedly has the blessings of the Federal Home Loan Bank Board (R. 18) and was adopted pursuant to an Act of Congress. It is true that sometimes a State through its Courts can violate the 14th Amendment but in this case the State Court did not alter the Petitioners' property rights in any way, but simply dismissed the Petitioners' complaint that attempted to have the by-law declared invalid.

Even if this Honorable Court were to rule that the petitioners have properly presented a constitutional objection and that the State Courts dismissal of Petitioners' attempt to get an injunction is considered a violation of the 14th Amendment, nevertheless, if the nominating by-law is Constitutional and valid, then this establishes the validity of the election and disposes of the attack on same as the incumbent Directors were the only directors nominated in accordance with the by-laws or in any other manner.

The nominating by-law under attack provides:

"NOMINATING COMMITTEE. The president, at least 30 days prior to the date of each annual meeting, shall appoint a nominating committee of three per-

sons who are members of the association. Such committee shall make nominations for directors in writing, and deliver to the secretary such written nominations at least 15 days prior to the date of the annual meeting, which nominations shall forthwith be posted in a prominent place in the home office for the 15 days' period prior to the date of the annual meeting. Provided such committee is appointed and makes such nominations, no nomination for directors except those made by the nomination committee shall be voted upon at the annual meeting unless *other nominations by members are made in writing and delivered to the secretary of the association at least* 10 *days prior to the date of the annual meeting* (emphasis added) which nominations shall forthwith be posted in a prominent place in the home office for the 10 days' period prior to the date of the annual meeting. Ballots bearing the names of all persons nominated by the nominating committee and by other members prior to the annual meeting shall be provided for use by the members at the annual meeting. If at any time the President shall fail to appoint such a nominating committee, or the nominating committee shall fail or refuse to act at least 15 days prior to the annual meeting, nominations for Directors may be made at the annual meeting by any member and shall be voted upon." (R. 14, 6).

It is admitted that these provisions were complied with. (P. for C. 8, 19).

(Note. In explanation of this reference to the record, it is taken from some typewritten sheets served upon Respondent which Respondent presumes is meant to

be the record although it contains nothing to show that it is the record. As many of the pages are not even numbered, Respondent has supplied this deficiency).

It is to be noted that although paragraph 15 of the complaint sets forth that the results of the election of the Directors was announced by the Auditor, Walter C. Askew, (R. 6, 5) petitioners nowhere set forth the tabulation to show how many votes were cast by the official proxy committee, by other proxies or in person.

It is alleged that this by-law results in "denying to members the right to vote for persons of their choice." (P. for C. 9, 10).

This unsupported conclusion is directly contrary to the plain language of the nominating by-law which provides that after the nominations have been made by the nominating committee and posted that any member may make other nominations providing they are "made in writing and delivered to the secretary of the Association at least ten days prior to the date of the annual meeting." Those attacking the by-law admit that no effort was made to comply with this provision.

One of the general demurrers sustained by the Judge of the Superior Court directly made this point.

> "Demurs generally to the said Petition and move to strike same as the Petition shows on its face that no other persons were nominated, hence any votes cast for the nominees were sufficient to elect them, there being no other names for whom a vote could be cast." (R. 18, 33).

The Judge of the Superior Court denied a temporary restraining order ruling on the validity of this by-law.

"That by-law 12 of the Association prescribing the method of nominating directors is a lawful and valid provision, and does not deny to members the right to vote for persons of their choice at annual meetings as any member could have nominated anyone as a director by conforming to reasonable provisions of the by-laws." (R. 35, 12).

The Judge then ruled on the general demurrers sustaining this ground (among others) and dismissing the Petition. The Supreme Court of Georgia likewise determined that this was a reasonable, valid and enforceable by-law as:

"The rule under attack expressly gives to each member the right to make nominations in writing to the secretary of the association at least ten days prior to the annual meeting.

"The contention that these rules are invalid as depriving the members of their right to participate in the nomination and election of the directors of the association cannot be sustained.

"It does not appear that any nominations for directors were before the meeting other than those submitted by the nominating committee." (R. 39, 30).

The by-law appears to be perfectly reasonable. Certainly nothing is advanced to show that it is against public policy. The Supreme Court of Georgia in citing *Hornady vs. Goodman*, 167 Ga. 555 (146 S.E. 173) said:

"It is a general rule that a corporation may enact any by-law for its internal management so long as

such by-laws are not contrary to its charter, a controlling statute, its articles of incorporation or violative of any general rule of public policy. Subject to the above qualifications, a Corporation may adopt by-laws regulating the calling and conduct of corporate meetings and elections of its officers." (R. 39, 17).

"On the contrary, the by-law under attack has been approved by the Central Board of the Federal Home Loan Bank. (Volume 23, No. 249 Fed. Reg. P. 98-97)." (R. 39, 27).

Even though votes may have been cast against the nominees, these were purely negative votes as not in favor of any nomination before the meeting and hence were of no effect. Any votes cast for the nominees would have been sufficient to elect them. Actually, however, the Judge of the Superior Court found that 719 unchallenged votes were cast for the nominees while there were only 649 so-called "negative votes." In addition to these 719 "unchallenged votes," there were 24,696 votes by proxy cards, the validity of which Booker, et al do challenge. (R. 34 and 35).

As stated, however, if the nominating by-law was Constitutional and valid, then the question of the validity of the so-called proxy cars is completely immaterial and would have no control over the decision.

Proxy Cards

As stated, an attack is made upon the validity of the proxy cards given by the members which would be immaterial if the foregoing nominating by-law is valid. However, it is respectfully submitted that the proxy cards are entirely valid. The proxy feature reads as follows:

"The official Proxy Committee of the Institution is authorized *in my absence* to cast my vote or votes at any meeting of the members from year to year until this proxy is *cancelled* in writing." R. 13, 17). (Emphasis added)

It is alleged that the proxies are invalid as they are not "to two or more persons" in violation of Section 22-1863 of the Code of Georgia. Neither this Code Section nor any other law of Georgia so provides. Actually, the Section does provide that any stockholder may "vote by proxy or proxies."

"22-1863. *Proxies*. At any meeting of the stockholders of any corporation any stockholder of record may be represented and vote by proxy or proxies appointed by an instrument in writing. If such instrument in writing shall designate two or more persons to act as proxies, a majority of such persons present at the meeting, or, if only one shall be present, then that one shall have and may exercise all of the powers conferred by such written instrument upon all of the persons so designated unless the instrument shall otherwise provide."

It is contended that this proxy is for an unlimited time, yet the proxy is cancellable at will, and is of no effect if the member attends the meeting.

No decision (Georgia or otherwise) is cited to sustain the proposition that such a revocable proxy is invalid. In fact, the only decisions cited in the Court below dealt with "irrevocable proxies," and hence were not in point.

It is alleged that these proxy cards were invalid as the members did not know what they were signing.

The law of Georgia and the general law is that a party of full age and capacity is presumed to know what he signs and cannot repudiate his act unless he can show that he is suffering under a disability, that fraud has been practiced upon him, or a legal duress. No such claim is made.

It is suggested in the original Petition that the proxy card itself discloses an effort to hide the proxy feature from the signer. A reference to the card (R-13) shows this to be completely unfounded. At the very beginning of the card is the caption with the words:

"containing proxy authorization."

In the body of the card are four lines, in the same size letters as the rest, making the appointment of a proxy and outlining the terms of same in words any one can understand.

It is claimed that the proxy card denies "to members the right to vote for persons of their choice" when as a matter of fact, it specifically reserves to the members the right to vote either in person or by a new proxy revoking the old.

It attacks the proxies because they are "for an indefinite number of votes, yet the by-laws of the Association of which each is a member specifically sets out the method of mathematically determining the number of votes each member may cast. (R-9).

It claims that the proxy is vague, and that the powers are not named. The reading of the proxy, however, shows the fallacy of this attack.

". . . in my absence, to cast my vote or votes at any meeting of the members."

At this point it should be stressed that the Petition only attacks the so-called proxy cards addressed to the Committee, yet the record shows that there were *719* votes in favor of the elected directors, 341 votes by persons present and 378 votes by written proxies (other than the proxy cards) appointing an individual as proxy. As stated, these votes are not attacked.

Place of Meeting

The Petition below complains that the meeting should not have been held at the offices of First Federal as they were too small and they were crowded.

A sufficient answer to this is that the by-laws of the Association provide that the meeting must be held at the home office. (R. 10, 4). The notice for such meeting must be advertised a certain length ahead of time. This was where the meeting had to be held. If the persons who are seeking to upset this election considered that this was an improper place to hold the meeting, they should have made such a motion at the previous meeting of the Board of Directors so that a resolution could have been adopted and proper notice could have been advertised. It is significant that of the persons attacking the election, one had been Chairman of the Board and several of the others directors, thoroughly familiar with the by-laws of the Association.

Answering Specially
Purpose

The purpose for which Petitioners seek the writ of certiorari is correctly stated in paragraph 1.

Statement of Case Not Concise and Introduces Two Attacks Not Presented Below

Answering paragraphs 2 through 15 inclusive and 17, respondent says that these paragraphs do set forth

almost verbatim a statement of the allegations of the Petition in the Superior Court. It correctly states the contents of such Petition, but certainly not concisely.

Paragraph 16 for the first time, since this case started brings in the 14th Amendment.

Paragraphs 18 and 19 also desert the 5th Amendment in favor of the 14th Amendment and for a second brand new attack on the by-laws and proxies, these paragraphs allege for the first time that the nominating by-law and the proxy are unconstitutional as they attempt to illegally perpetuate the officers in office. No such attack was made in either Court below.

Record Confused

Answering paragraph 20 the respondent says that a copy of the ruling of the Judge of the Superior Court sustaining the demurrers and dismissing the Petition is not in the record, but this is unimportant as the ruling contains no opinion, but merely orders the demurrers sustained and the Petition dismissed. However, there is not appended to the Petition for Certiorari a copy of the judgment to the Supreme Court of Georgia as required by Rule 23 (1) J.

Contentions of Petitioner

Answering paragraph 21 Respondent says that same correctly states Petitioners' contentions although it is denied that they are correct.

Opinion State Court Not Appended

Answering paragraph 22, Respondent agrees that it properly presents question for consideration although Respondent denies that there is any merit in same. As stated, the opinion is not appended to the Petition

for Certiorari as required although it is a part of some typewritten sheets handed Respondent which is the only record received. This is a serious omission as a reading of the opinion would carry conviction of its soundness with it. We have supplied this deficiency by quoting liberally from it in previous part of this Brief.

No Motion Rehearing

Answering paragraph 23, the Respondent says that a final decision has been rendered, but denies that all remedies have been exhausted, as no motion was filed in said Supreme Court of the State of Georgia for a rehearing.

Substance of Question

With reference to the allegations that the State Court has decided "a federal question of substance not theretofore determined by this Court," this is respectfully denied.

The Supreme Court of the United States has recognized in *Rogers vs. Hill*, 289 U. S. 588 that the general law with reference to Corporate by-laws is that:

> "Power to prescribe rules for the government of business corporations reasonably is deemed an incident of ownership, and the voting power of the shares."

Where the Supreme Court has considered corporate by-laws, it has determined that these are not federal questions, but that they are determined by the law of the State in which the Corporation is domiciled.

It is further submitted that the decision of the Supreme Court of Georgia sustaining the reasonableness and validity of the nominating by-law conforms

to the law generally on such subjects throughout the United States, and is certainly not contrary to any applicable decision of the Supreme Court of the United States.

We have already pointed out several reasons why the writ of certiorari should not be granted and conclude by submitting that the only Federal question involved deals with the nominating by-law, which seems reasonable and proper for the operation of a Federal and Savings Loan Association and there is no substance in the attack thereon.

It is therefore respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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I, ..., one of the attorneys of record for Petitioners, acknowledge receipt of 3 copies of the foregoing brief.

This ..... day of November, 1959.

.....

CORRECTION

Since the preparation of this answer and brief, Petitioners have filed an Appendix to the Petition setting forth the opinion of the Supreme Court of Georgia.